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IN THE

Supreme Court of the United States

October Term, 1974

No. 75-48

ROBERT A. SUTTON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-.....

ROBERT A. SUTTON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Robert A. Sutton, prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review its judgment entered March 11, 1975, rehearing and rehearing en banc denied May 20, 1975, affirming the judgment of the United States District Court for the District of Columbia, Hon. Charles R. Richey presiding, convicting petitioner for conspiracy to violate Title 21, United States Code, Section 841 (a) and sentencing petitioner as a "dangerous special drug offender" pursuant to Title 21, United States Code, Section 849.

OPINIONS BELOW

The judgment of the Court of Appeals was accompanied by an unsigned Memorandum. Tabular notation of the judgment appears at 511 F.2d 448. A copy of the Memorandum is annexed hereto as Appendix A.

The judgment of the District Court was entered without written opinion after a jury trial. A copy of the judgment Order is annexed hereto as Appendix B.

JURISDICTION

The decision of the Court of Appeals was entered on March 11, 1975. Leave to file an untimely petition for rehearing or rehearing en banc was granted on May 20, 1975. A copy of the pertinent Order is annexed hereto as Appendix C-1. Rehearing and rehearing en banc were denied on May 20, 1975. Copies of the respective orders are annexed hereto as Appendices C-2 and C-3.

An application has been granted by the Chief Justice for extension of the time within which to file the instant petition until July 19, 1975. This petition, having been filed on or before July 19, 1975, is within the time allowed by Rule 22 (2) of this Court.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Should federal criminal conspiracy prosecutions be required to conform to the Model Penal Code provisions—which resolve procedural questions according to the culpable conduct and knowledge of each accused—rather than to the approach heretofore permitted by this Court—which resolves procedural questions according to the alleged dimensions of the conspiratorial network?

2. Assuming Question 1 is answered in the negative, whether the existence of material variance between pleadings and proof

as to the number of conspiracies is, in all cases or in this case, a question to be decided by the judge, not the jury?

3. Whether the "harmless error" doctrine can be invoked where (1) the trial court has found a pattern of prosecutorial misconduct, (2) the evidence of guilt, although quantitatively substantial, is qualitatively shabby, and (3) the jury's mixed verdict indicates that instructions were not followed?

4. Whether the "dangerous special drug offender" sentencing provisions of Title 21, United States Code, Section 849, on their face or as applied to petitioner, are repugnant to the Bill of Attainder, Due Process, Double Jeopardy, Indictment, Jury Trial, Confrontation, Public Trial and/or Cruel and Unusual Punishments clauses of the Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Article I, Section 9, Clause 3:

No Bill of Attainder . . . shall be passed.

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Title 21 United States Code, Sections 849, 850 appear as Appendix D.

STATEMENT OF THE CASE

On June 18, 1973, seventeen persons were indicted by a District of Columbia grand jury for conspiring within six different districts during the period of May 15, 1972 through April 10, 1973, to distribute heroin in violation of 21 U.S.C. Section 841(a).[1] Thirteen of the defendants bargained a variety of pleas. They had all been participants in a retail narcotics distribution operation conducted in the District of Columbia by one David McNeil. The remaining four defendants chose trial. Their base of operations was in New York City. They were allegedly McNeil's wholesale suppliers and contacts, and were deemed non-peddlers. The prosecutor consistently distinguished them from the McNeil gang, characterizing them as the "New York defendants" or the "New York gang."

1. A second count of the indictment does not relate to petitioner, and was not in issue at petitioner's trial.

Of these four, one, Hazel Brown Vento, was granted judgment of acquittal at the close of the government's case. Anotner, Charles William Cameron, a/k/a Swayzie, who was the prosecution' main target, gained a mistrial (and ultimately a dismissal with prejudice) after the jury was unable to agree as to his guilt. The two remaining defendants, Zebadee Jenkins and petitioner, were convicted. Petitioner was sentenced as a "dangerous special drug offender" to a prison term of 6 to 18 years, and an additional special parole term of three years. *See* 21 U.S.C. Section 849 (1970).

In broad outline, the proof adduced at trial established (1) the existence and nature of the McNeil organization, a retail narcotics operation in the District of Columbia, which (2) from May through mid-December, 1972, obtained its wholesale supply from Jenkins, and (3) from February through April, 1973, obtained its supply from Cameron. (4) Petitioner initially had been Jenkins' agent, and later moved into Cameron's camp.

In its opening, the government referred to McNeil's cessation of commerce with Jenkins, and the delayed commencement of the Cameron connection. At the conclusion of the opening, petitioner moved for a dismissal, asserting that the prosecution by its own admission was intent on proving multiple conspiracies: in one, Jenkins, with petitioner as his agent,[2] would be the supplier; in the other, Cameron, aided by petitioner, would be the supplier.

The evidence was consistent with the multiple conspiracy hypothesis.[3] The effort to link Jenkins directly with Cameron

2. Petitioner's alleged role was that of customer's man. He would effect delivery of heroin and receive payment on behalf of his principal. Delivery would be accomplished in New York.

3. As shall be demonstrated below, there were — in fact and at law — three on-going conspiracies. One was the McNeil operation. Its objectives were to peddle narcotics in the District of Columbia area, so as to realize a profit capable of supporting McNeil's massive addiction and the drug dependencies of his operatives. McNeil was without control from above (except insofar as Cameron demanded that McNeil double his sales as a condition for obtaining

was wholly discredited. One proferred linkage was Ms. Vento. As to her, the government failed to prove membership in any conspiracy; hence she could not be the missing link in a Cameron-Jenkins conspiracy. The other proferred linkage was petitioner, on the theory that he was equally allied with both suppliers. But the only pertinent evidence established that he moved from Jenkins' employ to Cameron's, just as a factotum might leave General Motors to take a job with Ford.[4] According to the testimony of the prosecution's star witness (Joann Enoch), petitioner told McNeil on October 30, 1972 that he had decided to leave Jenkins and "start hooking up with [Cameron]."

Having been denied a bench ruling that multiple conspiracies were in issue, not the single network pleaded, the defense later prevailed upon the court to instruct the jury that all three remaining defendants must be acquitted if the jury found more than one conspiracy.[5] The jury convicted Jenkins and

supplies from Cameron). Rather than being at one time Jenkins' agent, at a later time Cameron's, McNeil dealt with each supplier at arm's length.

Jenkins and Cameron were competitors. They were no more in league than General Motors is with Ford, or Macy's with Gimbel. McNeil turned first to one; then the other — and perhaps still others — as his needs and market conditions varied. Thus there were two separate conspiracies whose objectives were to supply wholesale quantities of heroin to McNeil. The Jenkins-McNeil axis existed during portions of 1972. The Cameron-McNeil axis existed during portions of 1973. In the interim, there is a six week span during which the government has not identified McNeil's wholesaler.

On the foregoing facts, a conspiracy encompassing both Jenkins and Cameron could only exist if, rather than being illicit competitors, they had divided and manipulated their market. Criminal cartels which dominate their contraband markets are properly reached by a broad conspiracy dragnet. But individual entrepreneurs whose illicit activities do not mimic antitrust violations by otherwise legitimate enterprises — *i.e.*, who are competitors, not cooperators — do not belong to a single wide-spread conspiracy.

4. Indeed, at sentencing, the assistant stated, "[Petitioner] was employed by Mr. Jenkins, and then later on by Mr. Cameron."

5. The pertinent instructions were as follows:

> "The indictment in this case, ladies and gentlemen, charges one overall conspiracy. They say it began on or about May 15, 1972, and ended on or about April 10, 1973. That's the charge.
>
> Now, if after analyzing the evidence in this case in the manner I have told you in accordance with the principles of law that I have given you as you are required to do, and if after doing that you do not find beyond a reasonable doubt that there was a single continuing overall conspiracy, and if instead you find from the evidence that there was more than one separate independent conspiracy, with separate and distinct groups involved, and if you find that some of the defendants belonged to one conspiracy and not to the other, and that other defendants belonged only to the other conspiracy — then and only then if you so find, there would be no proof of this one overall conspiracy which is charged in this indictment and you would be required to return a verdict of not guilty as to all of the defendants charged in this case."

petitioner, but could not agree as to Cameron.[6]

The Court of Appeals viewed the jurors' action as "indicating, if anything, that they [recognized] the necessity of finding that each of the defendants was a member of a single, continuing conspiracy." On the present record, the jury could have found a single Jenkins-McNeil conspiracy which terminated in mid-December, but could not have found it continuing through the following April. A portion of the jury could have found that a Cameron-McNeil conspiracy seperately existed. But because this conspiracy was of much shorter duration, the Jenkins conspiracy was considered the main one. Hence the Cameron verdict.

However compelling may be the logic of such a determination, it is necessarily contrary to the instructions. By finding a greater and not lesser conspiracy, a fraction of the jury would in fact find two, not "one continuing conspiracy."[7] To the extent that the

6. The jury had ample evidence upon which to convict Cameron for conspiring to distribute heroin to McNeil. The case against Cameron was at least as "strong" as that found by the Court of Appeals against petitioner. Petitioner urges that the verdict reflects the jurors' view that there was a McNeil retailing conspiracy; that Jenkins, aided by petitioner, dealt to the McNeil ring; but as to Cameron, the jurors more likely disagreed as to whether his conduct was part of the same conspiracy to which Jenkins belonged, than as to whether any agreements or overt acts were adequately proved against him.

7. Note that in a court-martial, the members (*i.e.*, jurors) may enter exceptions by substitution to the charges pleaded. Thus, although theirs is considered a general verdict, they might properly narrow, *e.g.*, the time frame

jury found Jenkins and petitioner to be members of one conspiracy, neither the verdict nor the opinion below precludes the very real possibility that it was a different conspiracy from the one pleaded.

Whatever may be the true meaning of the verdict, it terminated a trial which casts no credit on the ethical standards of the United States Attorney's office. The government's trial strategy is notable on two scores. First, the trial assistant repeatedly acted in derogation of duties imposed by statute, by the district court, and by contemporary standards of professional conduct. Second, his presentation was directed more to the jurors' emotions than to their intelligence.

On the first score, there was repeated failure to timely provide the defense with Jencks Act (18 U.S.C. Section 3500 (1970)) and *Brady*[8] materials, notwithstanding repeated admonitions from the court. Although relieved of all other responsibilities months before trial, the assistan neglected to timely provide the defense with a five-page statement given by the star witness, Enoch, to Detective Robert J. Kanjian. The statement contradicted an important segment of Enoch's testimony. Thereafter, Jencks Act material of another witness, Loretta Masterson, was not tendered until after she had left the witness stand and the District. The import of Masterson's testimony was substantially diminished by the withheld evidence, which had to be brought to the jury's attention by means of an out-of-context stipulation. Although the prosecutor disclaimed any prior knowledge of the existence of the Masterson statement, the police officer who prepared it gave unrebutted testimony that a notation on it appeared to be in the prosecutor's own hand. At

within which a conspiracy operated. *See* Section 74*b Manual for Courts-Martial, United States* (1969 rev. ed.), 3 C.F.R. 802 (Comp. 1966-70); *cf. United States v. Calley*, 46 C.M.R. 1131 (ACMR 1973) (reduction in number of victims pleaded collectively in the specifications of Charge 1). Such procedures for clarification are not available to civilian federal juries.

8. *Brady v. Maryland*, 373 U.S. 83 (1963) (Prosecutor has duty to provide exculpatory material to defense).

another point, during a Wade-Stovall hearing, exculpatory evidence—grand jury testimony by Detective Kanjian that a major witness' identification of a co-defendant had been only "tentative"—was improperly withheld.

On occasions, when confronted with an adverse ruling, the assistant stocked the courtroom with Mr. Titus, then United States Attorney, and Mr. Silbert, then principal assistant to Mr. Titus. These gentlemen threatened interlocutory appeals, provoking the court to characterize their conduct as an effort "to stare me down." Later the court felt impelled to declare:

> . . . I don't know what the statistics precisely show, but there has never been a trial that I have participated in as a lawyer or as a judge—and there have been thousands—not hundreds, but thousands—in which I have been so tortured, as you put it, as I have been since November 23rd.
>
> I feel abused, not personally, but as a Court and as a judicial officer of the United States . . . .
>
> . . . I have tried to do my duty, and will continue to do so, not only in this case, but in all others, regardless of what direct or indirect pressures may be put upon this Court.

The extraordinary revelation contained in the quoted remarks succintly demonstrates that the government's overreaching goal was victory—to seek convictions. Consistent with this goal, the prosecutor repeatedly appealed to the jurors' emotions. This is understandable, since his major witnesses—and most minor ones—were the flotsam and jetsam of an unseemly life style.[9] The testimony of the major witnesses—

9. Joann Enoch, the prime government witness, exhibited virtually total recall when the prosecutor posed questions, but mysteriously lost that ability on cross. She could not remember the terms of the bargain which elicited her testimony. Enoch, once a topless dancer, and a mother before her twelfth birthday, had enticed McNeil to leave his wife and children and live with her. McNeil had a gargantuan heroin habit, which Enoch said consumed $250 daily. Her asserted preference was for preludin, an amphetamine, but her

and most of the minor ones—was often vague, inconsistent, or incredible.[10]

To make his case, the prosecutor resorted to adept application of the psychology of mass hysteria, as compensation for the lack

scarred arms belied her claim of infrequent heroin use. She routinely supported herself through expertise in the media of bad checks, false credit cards, and outright theft of goods and services. She bartered her testimony for a grant of immunity and governmental assistance in relocating to North Carolina.

Marvin Teasley, a/k/a Tina, a heroin addict and purveyor, was nearing completion of a sex alteration procedure. She dressed, and was addressed at trial, as a woman. Teasley boasted of her popularity with both men and women. But her confusion was not limited to sexual identity. She was confused as to petitioner's identity. She told Detective Kanjian that she had never met petitioner, but testified that she had met him. Attempting to explain this discrepancy, she merely claimed not to know petitioner's name. That petitioner, alone of the codefendants, kept his head shaved bald, made no impression on Teasley, and was of no aid in her pretrial identification — although she selected him from a photo array in which only petitioner was bald. Teasley's testimony was the consideration for a plea bargain.

Lenwood Sharpe, another junkie, had prior convictions for forgery, making a false report to police (reduced from embezzlement), and narcotics possession. He traded his testimony for the dropping of unrelated drug charges and immunity as to his role in the McNeil conspiracy.

The fourth of the government's self-styled "major" witnesses, Tony Parker, had also been an addict. Her testimony did not relate to petitioner's actions or knowledge. She never saw, identified, or mentioned petitioner. Beyond describing her introduction to narcotics and to the McNeil ring, her testimony reached Jenkins and Cameron only insofar as she claimed to have overheard an unsuccessful effort to reach either of those two by telephone, for unknown purposes. Her testimony was offered in exchange for a plea to a reduced charge, dismissal of the conspiracy charge, and non-prosecution of her lover. As with the other co-conspirator witnesses, dismissal of the conspiracy charge, and sentencing on any reduced charge, were deferred until the performance offered at petitioner's trial could be evaluated.

Other witnesses, whom the government deemed "minor", provided a semblance of corroboration as to overt acts. But the corroboration was at best, less than it easily might have been; at worst, it consisted of the vague recollections of individuals sharing the common attributes and credibility of the principal quartet.

10. For example, the jury was asked to believe that total strangers, seemingly oblivious of the grave risks entailed, upon chance meeting, would sell McNail and his cohorts wholesale quantities of heroin in the back room of a Harlem bar.

of credible testimony. Accordingly, he repeatedly preyed on the prevailing view that heroin is the nation's Number One enemy, in order to evoke fear and conditioned response from the jurors. Further exploiting this, the assistant continually referred to the defendants on trial as the "New York gang" represented by the "New York lawyers." The jurors were invited to imagine—in the absence of proof—that they had before them big shots, Mafiosi, rich men who ravaged the law-abiding citizenry in the reckless pursuit of wealth; criminals who, whenever caught, used their ill-gotten gains to escape punishment by hiring the best legal talent to confuse and mislead jurors. The jury, consequently, was intimidated—they would rather convict on dubious evidence than become the dupes of New York sharpies.

To the prosecutor, it was irrelevant that the record belied his implications. Petitioner's financial resources are far from vast. He could not make bail pending appeal.[11] Only after the verdict would the prosecutor candidly admit that Jenkins, but not petitioner, was a "source" of narcotics; that petitioner's job was "to receive telephone communications, to arrange the interception [*i.e.*, meeting] of people coming from Washington, or the trips to the District of Columbia from New York, and to negotiate these transfers, and to arrange for the ultimate payment of money." In other words, petitioner was a lowly messenger, not a black counterpart of the French Connection.

The prosecutor's unethical strategy climaxed with his closing argument. There he asserted, contrary to the record, that the accused were "people who are supplying narcotics at the highest level." As a result of such nefarious activities, he continued, they can afford to retain "[t]hree of the best lawyers in the country, without question. . . ." To alleviate any doubts as to their guilt, the assistant assured the jury that additional evidence had been left out so that the jurors could be home for the holidays:

11. After verdict, bail was set at $20,000. Twenty-five days later, when petitioner moved to reduce bail, the prosecutor, although offering no new information, prevailed upon the court to revoke bail.

> . . . Ladies and Gentlemen, we could have stayed here and tried this case through Christmas and New Year's and we could have called 300 or 400 witnesses.

The verdict followed.

Before trial, the government applied for sentencing, in the event of conviction, under the "Dangerous Special Drug Offender" provisions of 21 U.S.C. Section 849 (1970). It alleged that petitioner's conduct, if proven, would meet the requirements of subsection (e) (3). Its application tracked the subsection's language, asserting that petitioner conspired and did, or agreed to, "initiate, organize, plan, finance, direct, manage, or supervise" a narcotics conspiracy involving three or more other persons. At sentencing, the court, without revealing which of the quoted verbs it deemed applicable,[12] approved the government's application. Petitioner was awarded a sentence identical to that given Jenkins: 6 to 18 years in confinement, plus a special parole term of three years.

Petitioner's and Jenkins' appeals were disposed of in a single opinion. The Court of Appeals deferred to the jury's determination on the variance question. It did not discuss the government's multiple failures to comply with discovery requirements, repeated preying upon the jurors' emotions and regional prejudices, or flagrant abuse of the trial court's dignity. It *did* find error in the prosecutor's allusion to 300-odd uncalled witnesses. But in consideration of the "strong"—not overwhelming—case, the trial court's curative efforts, and the jury's ability to disagree as to Cameron, the Court of Appeals concluded that the error was harmeless.

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12. The court stated that its determination was based upon the evidence adduced at trial, the dangerousness and large quantities of the drug distributed, petitioner's failure to file income tax returns, his participation as a "principal" though not an "actual leader," and his age, education and social advantages. The court indicated that the harshness of the sentence meted out was premised on a desire to punish, rather than on a belief that petitioner, a first offender, would otherwise resume his criminal career. *But see* Section 849 (f).

REASONS FOR GRANTING THE WRIT

1. FEDERAL CRIMINAL CONSPIRACY PROSECUTIONS SHOULD BE REQUIRED TO CONFORM TO THE MODEL PENAL CODE PROVISIONS—WHICH RESOLVE PROCEDURAL QUESTIONS ACCORDING TO THE CULPABLE CONDUCT AND KNOWLEDGE OF EACH ACCUSED—RATHER THAN TO THE APPROACH HERETOFORE PERMITTED BY THIS COURT—WHICH RESOLVES PROCEDURAL QUESTIONS ACCORDING TO THE ALLEGED DIMENSIONS OF THE CONSPIRATIONAL NETWORK.

In urging substitution of the *Model Penal Code* approach to conspiracy prosecutions for that permitted by this Court through case-by-case adjudication, petitioner candidly invites the exercise of this Court's supervisory power over the federal judicial system.[13] Although designed for legislative enactment by the states, the pertinent *Model Penal Code* provisions can readily be adopted through judicial decision. *Cf. State v. Gregory*, 66 N.J. 510, 333 A.2d 257 (1975) (adopting compulsory joinder provisions of *Model Penal Code* Section 1.07 (2), (3)). Judicial implementation of the conspiracy provisions is particularly appropriate, because they were drafted to meet cogent criticisms of this Court's prior exercises of supervisory power. See *Commentary* to Section 5.03, Model Penal Code Tentative Draft No. 10 (1960) (hereinafter, "*Commentary*"). Where, as

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13. Petitioner can make a substantial constitutional claim for relief predicated upon the Due Process, Confrontation, and Trial in Vicinage clauses. But the distinction between that which the Constitution commands, and that which it commends, here can appropriately be ignored. This distinction is of no immediate consequence, and a supervisory ruling is preferable, because (1) procedures in state prosecutions are largely determined by state law; (2) a decision on constitutional grounds would invite further litigation as to retroactivity; (3) the Congress has consistently deferred to the judiciary's special expertise for the development of procedural protections against overbearing approaches to the prosecution of criminal conspiracies; and (4) the outcome for petitioner would not vary if decision were made on constitutional grounds.

the *Commentary* demonstrates, the procedures previously approved are unsatisfactory guides for the conduct of trials, adoption of a superior, systematic approach is in order.

A. The realities of the activities alleged in the instant indictment demonstrate the existence of not less than three seperate conspiracies to distribute heroin:

> 1. A single continuing conspiracy to distribute heroin at retail within the District of Columbia was organized and operated by McNeil. It apparently was active during the full period encompassed by the indictment.
>
> 2. A wholesale heroin dealership was operated by Zebadee Jenkins in New York City. Together with petitioner as his agent, Jenkins' activities, insofar as they are reached by the indictment, involved sales to McNeil's combine from the inception date pleaded until not later than December 19, 1972.
>
> 3. Another wholesale heroin dealership was conducted by Charles Cameron in New York City. More than a month after McNeil discontinued his purchases from Jenkins, he commenced business with Cameron. Petitioner independently had transferred his allegiance from Jenkins to Cameron, and served as Cameron's "customer's man" with the McNeil account during the final three months reached by the indictment.[14]

That there were in fact three distinct conspiracies, not one, is not merely consistent with the evidence adduced at trial, the jury's ambiguous verdict, and the government's argument to both lower courts concerning the distinctive quality of the New York defendants; it is consistent with the findings of empirical

14. During the hiatus from mid-December to January, it is unclear as to where McNeil procured his operation's supply. There is sketchy evidence that efforts to obtain heroin were made in North Carolina and Philadelphia. But assuming that was the purpose of the alleged trips, they in no event implicate petitioner, Jenkins, or Cameron. To the contrary, they tend to establish that the Jenkins-McNeil axis was broken.

researchers. See, *e.g.*, E. Liebow, *Tally's Corner* (1967); R. Blum, *The Dream Sellers* (1972); B. Johnson, *Marihuana Users and Drug Subcultures* (1972); B. Johnson, *The Drug Subculture and the Law* (1972); *cf.* R. Woodley, *Dealer: Portrait of a Cocaine Merchant* (1971)

These authorities suggest that contemporary urban narcotics distribution is accomplished in conformity with a recurring pattern.[15] This pattern may validly be characterized as a low-initial-capital parody of the free enterpise model. Individual entrepreneurs—usually precluded by social or personal characteristics from significant legitimate opportunity for upward mobility, although occasionally substantially mobile but impatient with the pace characteristic of legitimate commerce—attempt to parlay small investments into substantial fortunes by taking advantage of the artificial market conditions generated by the law's prohibitions. In doing so, they are in acute competition with one another, seeking to minimize costs and maximize profits.

Although by hypothesis there exists a mutual dependency between and amongst addict-customers, intermediate purveyors, raw product processors, and opium poppy growers, this interpendency—absent the parody of antitrust violations reflected in an organized crime syndicate—is not reasonably or realistically treated as a single, grand conspiratorial enterprise.[16] Rather, at each level of operations, individual en-

15. Excluded from this discussion are bona fide organized crime syndicates, there being no evidence that McNeil, Jenkins, Cameron or petitioner were party to such an operation. Characteristically, syndicated crime takes the form of a franchise operation, in which particular illegal (and sometimes legal) activities are allocated by type, locale, and size of operation, under threat of extra-legal enforcement by the cartel.

16. By analogy, none would seriously argue that the consumer victimized by anti-trust violators is a co-conspirator for failing to boycott the tainted merchandise; or that firms supplying the antitrust violators are thereby implicated in the scheme. Even where the supplying firms are in violation of the law with respect to their own operations, and might reasonably believe that their customers are illegally fixing prices, something more is needed to implicate them in their customers' conspiracy (or put differently, prosecutorial discretion

terpreneurs compete for a share of the market; independent purchase and sales decisions are made at arm's length with a view to optimizing individual interests. *Cf. United States v. Russell*, 411 U.S. 423, 432 (1973). Contrary to popular fiction and the geometrical metaphors enshrined in case law,[17] no mastermind schemes a grand criminal enterprise. Competition, supply, and demand generate a fractionated, acephalous industry. Within that industry, numerous individual organizations—McNeil's for one—may operate at a given level in conformity with the wheel or chain model. But the industry as a whole does not. It differs organizationally from the mainstream of American commerce only in that its product is contraband, its component firms all closely held.

Within this illegitimate burlesque of the free enterpise system, single transactions, or repeated on-going commercial relationships, may properly be reached in conspiracy prosecution. But the narcotics industry *en gros*, albeit illegal at every turn, cannot reasonably be deemed—or prosecuted—as a single, all-encompassing conspiracy. Nor can any complex portion of that industry be so prosecuted, absent evidence of syndicated crime. To prosecute the whole industry on a single conspiracy count—or as much of it as a prosecutor may claim to discern—is to defy reality and to turn 180 degrees from the

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is an inadequate safeguard against the over-broad conspiracy dragnet). *Cf. United States v. Falcone*, 311 U.S. 205 (1940); *but see Direct Sales Co. v. United States*, 319 U.S. 703 (1943).

17. The wheel model — in which a mastermind at the hub deals similarly with similarly-situated spokes—is described in *Kotteakos v. United States*, 328 U.S. 750 (1946). The chain model—in which a criminal hierarchy exists, each of its levels performing a different function—is described in *United States v. Bruno*, 105 F.2d 921, 922 (2d Cir.), *reversed on unrelated grounds*, 308 U.S. 287 (1939). The government has insisted that petitioner was party to a chain-type conspiracy. But it is axiomatic that in any hierarchy, separation of activities proliferates towards the bottom; consolidation is found at the top. Here the activities were competitive, not cooperative, as between the two top participants (Jenkins and Cameron). Hence, if the chain model applies, there were two chains, not one.

unanimous view of this Court, per Mr. Justice Harlan, in *Grunewald v. United States*, 353 U.S. 391, 405 (1957) (footnote omitted): "Prior cases in this Court have repeatedly warned that we view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions. The important considerations of policy behind such warnings need not again be detailed."

B. Unless trials are to be no more than distorted reflections in Alice's Lookingglass, pleading and proof must conform to empirical realities. Over and above these basic requirements, federal prosecutions are constrained by constitutional, statutory, and decisional law. These authorities place restrictions on prosecutorial discretion as to venue, timing, joinder, and evidence. Ultimately, the restrictions are intended to provide a rational and civilized means for ascertaining individual culpability, by striking a workable balance between facilitating punishment of individual criminals and maintaining the innocent citizenry's freedoms. But federal conspiracy trials are notable for their relaxation of the safeguards. Their tolerance for deviations is premised on the government's allegations as to the dimensions of a given conspiracy, and the judiciary's tendency to presume the existence of the alleged dimensions as a basis for all trial rulings. See generally Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405 (1959); *Developments in the Law: Criminal Conspiracy*, 72 Harv. L. Rev. 920 (1959); Note, *Federal Treatment of Multiple Conspiracies*, 57 Col. L. Rev. 387 (1957).

Trial courts presume that the conspiratorial dimensions conform to the government's claims, because the basic thrust of this Court's prior decisions has been to search for the conspiratorial boundaries, as to, *inter alia*, persons, objectives, and duration. *See, e.g., Grunewald, supra*; *Kotteakos v. United States, 328 U.S. 750 (1946)*; *Direct Sales Co. v. United States*, 319 U.S. 703 (1943); *United States v. Falcone*, 311 U.S. 205 (1940).

This approach generates numerous problems which have

repeatedly plagued the lower courts. For example, at trial, questions of venue cannot be resolved prior to receipt of all the evidence. In theory, and perhaps in practice, an individual defendant who is beyond the long-arm jurisdiction of a district court for purposes of a diversity suit must there stand trial. The decision on venue may ultimately revolve around the government's ability to prove someone else's overt act as to which the individual defendant had no knowledge and from which he could derive no benefit. In light of the constitutional guarantee of trial in the vicinage, the result is, at best, anomolous. Similarly, questions of admissibility of evidence as against some or all co-defendants must often be deferred until the court can determine whether a prima facie case for the conspiracy has been made, and which of the joined defendants has been prima facie implicated. Evidence which is totally irrelevant to an individual's conduct, knowledge, reasonable beliefs, or personal objectives provides a basis for conviction by imputation. Additionally, jury instructions tend to be so complex and lengthy as to necessarily compel judicial subscription to the "unmitigated fiction" that verdicts are obtained in conformity with the court's statement of the law. Appellate courts, exalting this fiction over reality, repeatedly avoid coming to grips with these difficult problems by invoking the talisman of "harmless error," secure in the knowledge that appellant did something worthy of official punishment. *See* Note, 74 Yale L.J. 553, 554-56 (1965). Absent corrective instructions from this court as to the proper resolution of these problems, justice will be recurringly a fiction.

Petitioner offers no panacea which can simultaneously preserve undiminished the rights of the accused and of the community. Even the most capable jurists, scholars, and practitioners have been unable to untie the Gordian knot. But they have come forward with a significant palliative in Section 5.03 of the *Model Penal Code*,[18] which has found acceptance in a number of States. Petitioner here urges that the pertinent *Model Penal Code* sections be adopted for the federal courts.

18. Section 5.03 is reproduced as Appendix E.

C. In contrast to the currently-approved search for the dimensions of a conspiracy as the dominant theme at trial, the *Model Penal Code* looks to the conduct, knowledge, beliefs and objectives of each individual accused.

> *Unilateral Approach of the Draft.* The definition of the Draft departs from the traditional view of conspiracy as an entirely bilateral or multilateral relationship, the view inherent in the standard formulation cast in terms of "two or more persons" agreeing or combining to commit a crime. Attention is directed instead to each individual's culpability by framing the definition in terms of the conduct which suffices to establish the liability of any given actor, rather than the conduct of a group of which he is charged to be a part—an approach which in this comment we have designated "unilateral."

Commentary at 104. Thus liability as to purpose relates to each accused's purpose, instead of merging his state of mind with the sometimes vague, sometimes multiple objectives attributed to the conspiracy. *Id.* at 107. And instead of searching for the boundaries of the conspiracy so as to define co-conspirators the search is for the extent to which one "is a conspirator with each of the persons involved in [any] larger criminal network to commit the crimes that are their objects." *Id.* at 188.[19] The key

19. [I]n most of these cases it is clear that each defendant has committed or conspired to commit one or more crimes; the question now is, to what extent is he a conspirator with each of the persons involved in the larger criminal network to commit the crimes that are their objects—*i.e.*, what is the scope of the conspiracy in which he is involved.

A narcotics operation may involve smugglers, distributors and many retail sellers and result in numerous instances of the commission of different types of crimes, *e.g.*, importing, possessing and selling the narcotics. A vice ring may involve an overlord, lesser officers, and numerous runners and prostitutes; it may comprehend countless instances of the commission of such crimes as prostitution, placing a female in a house of prostitution, and receiving money from her earnings. Has a retailer conspired with the smugglers to import the narcotics? Has a prostitute conspired with the leaders of the vice ring to commit the acts of prostitution of each other girl who is controlled by the ring?

The inquiry may be crucial for a number of purposes. These include not only

is to focus on the relationship of the individual to particular crimes and persons, instead of defining the dimensions of the conspiracy—and in some cases, continually redefining; *see United States v. Spock*, 416 F.2d 165, 188 n.9 (1st Cir. 1969) (dissent)—and then searching for a theory by which each defendant might be included within its orbit. *Commentary* at 119-26.

Venue and—with the exception of organized crime schemes, *see Model Penal Code* Section 5.03 (4) (a) (ii)—joinder are determined in accordance with the unilateral approach. A given defendant may be tried jointly only with persons with whom he actively conspired, or who acted in furtherance of his purposes and with his general knowledge. *Commentary* at 135-38. This is a narrower limitation than was applied at petitioner's trial.

defining each defendant's liability but also the propriety of joint prosecution, admissibility against a defendant of the hearsay acts and declarations of others, questions of multiple prosecution or conviction and double jeopardy, satisfaction of the overt act requirement or statutes of limitation or rules of jurisdiction and venue, and possibly also liability for substantive crimes executed pursuant to the conspiracy. The scope problem is thus central to the present concern of courts and commentators about the use of conspiracy — the conflict between the need for effective means of prosecuting large criminal organizations and the dangers of prejudice to individual defendants.

Under existing law it is probable that the resolution of questions about the scope of a conspiracy often depends upon the purpose for which the inquiry is made. Most of the cases in which the matter arises involve the question of variance between an indictment charging a single conspiracy and proof which may tend to show a number of smaller conspiracies; and the further question, if a variance there was, whether it was prejudicial to the defendant or simply constituted harmless error. It is extremely doubtful that courts finding a single large conspiracy in some of these cases would hold the same way if the question involved were, for example, liability for every one of the substantive crimes committed in furtherance of the conspiracy. The needs of the prosecution undoubtedly exert an influence in the direction of expanding the conspiracy concept, to a point where serious questions may be raised about the expanded concept as a measure of criminal responsibility and, further, about its impact on the defendant's right to fair trial and determination of his individual guilt or innocence.

As earlier indicated, the design of the Draft is to treat the joinder problem separately from the other matters that depend on the concpiracy's scope, instead of expanding or contracting the conspiracy concept to meet the conflicting needs. *Commentary* at 118-119 (footnotes omitted).

Venue is tested by the individual's overt act or agreement, or the overt act of one with whom he actively conspired, or who acted on his behalf. *Id.* at 138-39. Under present federal procedures, venue will lie in a district which does not meet the foregoing criteria.

In sum, by focusing on the individual accused, the *Model Penal Code* meets or substantially mitigates the objections—classically formulated by Mr. Justice Jackson, concurring in *Krulewitch v. United States*, 336 U.S. 440 (1949)—that ambitious conspiracy prosecutions tend to be unmanageable for the courts and unfair to the defendants.

D. The principles and procedures recommended in the *Model Penal Code*, although designed for adoption as State statutory law, are readily adaptable to implementation in the federal system by judicial decision. *Cf. State v. Gregory, supra.* Petitioner urges that such implementation is past due. This Court should grasp the opportunity here proferred, and adopt these considered recommendations of leading jurists, scholars, and practioners. By doing so, this Court would provide needed clear guidance for prosecutors; would reduce the tremendous and recurring cost—to the government and to defendants—attending litigation at trial and on appeal of question that, as here, are collateral to the accused's commission of acts as to which the government might justly complain; and most importantly, would generate increased assurance that jury verdicts are correct in fact and at law, *i.e.*, that justice had been vindicated.

E. Had the *Model Penal Code* procedural requirements been enforced at petitioner's trial, matters would have been remarkably different. Jenkins and Cameron could not have been jointly tried; they did not conspire with one another. Their acts and purposes were competitive, whereas by definition, conspirators are cooperators in crime. The time frames of their culpable acts were mutually exclusive. Each should have been tried seperately for conspiring to provide McNeil's operation with heroin during different intervals of time. Petitioner ad-

mittedly would have been separately liable for his acts as first Jenkins', later Cameron's, assistant. But to the extent he would face two separate prosecutions, it would be because at two seperate times he knowingly entered into two distinct conspiracies.

Assuming the indictments were not originally brought in the Southern District of New York—where petitioner's pertinent activities were centered—a trial court, not faced with the government's strained theory of a single conspiracy to distribute heroin in the District of Columbia, might readily have granted a change of venue.[20] Had a trial been held in New York, there would have been no opportunity for a prosecutor to appeal to the jurors' regional prejudices, as was persistently done in this case.

During trial, a wealth of irrelevant testimony as to the nature of McNeil's reatil operation, the manner in which various witnesses were drawn into his cohort, and the activities of McNeil's operatives during the hiatus between the closing of the Jenkins connection and the commencement of commerce with Cameron, would have been excluded. And the question inhering in the verdict—whether the case was not proved against Cameron, or he was thought to belong to a different conspiracy than Jenkins—could not have surfaced. With separate trials under the procedural standards petitioner urges, each verdict would have been crystal clear.

Whether the *Model Penal Code* approach, if adopted, would increase the government's litigation expenses, petitioner is unable to say. Although there would have to be more separate trials, each would tend to be shorter. As further compensation, appellate activity would be substantially narrowed in scope, if not diminished in quantity. Assuming, however, that the cost of prosecutions would show a net increase, it would be a small price to pay for the major gains in the quality of justice that would thereby be obtained.

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20. Note that after the verdict, Judge Richey, in setting high bail, specifically noted that whatever roots petitioner might have in New York City, he had none in Washington, D.C. Hence he was deemed a greater bail risk.

II. THE EXISTENCE OF A MATERIAL VARIANCE BETWEEN PLEADINGS AND PROOF AS TO THE NUMBER OF CONSPIRACIES IS, AT LEAST IN THIS CASE, A QUESTION TO BE DECIDED BY THE JUDGE, NOT THE JURY.

Variance in the number of conspiracies pleaded and proved is a recurring question that has plagued the federal courts at least since *Kotteakos*, *supra*. If, as petitioner urges above, this Court adopts the *Model Penal Code* approach for federal conspiracy trials, the variance problem all but disappears. *See Commentary* at 119, reproduced at note 19, *supra*. The required nexus between each accused and the offenses to be tried in a single proceeding generally precludes prosecutions of vast networks, except where there is substantial evidence of syndicated crime. If, however, the *Model Penal Code* provisions are to be rejected for federal conspiracy trials, there is need for a definitive ruling as to whether the existence of prejudicial variance in the number of conspiracies is a question to be resolved by judge or jury.

The courts below determined that the variance question is properly submitted to the jury. In doing so, they were following established precedent in the absence of clear guidance from this Court.[21] *See United v. Brown*, 495 F.2d 593 (1st Cir.), *cert. denied*, ——U.S.——, 95 S.Ct. 226 (1974), *United States v. Vicars*, 467 F.2d 452 (5th Cir. 1972), *cert. denied*, 410 U.S. 967 (1973); *United States v. Aiken*, 373 F.2d 294 (2d Cir.), *cert. denied*, 389 U.S. 833 (1967); *Koolish v. United States*, 340 F.2d 513 (8th Cir.), *cert. denied*, 381 U.S. 951 (1965); *Green v. United States*, 332 F.2d 788 (5th Cir.), *cert. denied*, 379 U.S. 949 (1964).

A. Although the existence of a conspiracy is a threshhold jury question, which must be resolved in the affirmative before the

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21. The apparent absence of conflict among the circuits is readily explained. If after receiving evidence a trial court finds variance, charges are dismissed and no appeal lies. If the court is uncertain, it submits the question to the jury. Only if no variance is found will the issue be preserved. Thereafter, the superficial view that the jury resolved a factual dispute is very comfortable. A contrary ruling might necessitate repeating an expensive showcase trial for defendants who clearly violated the law, albeit perhaps not in the manner alleged. See note 19, *supra*.

jury determines individual verdicts, petitioner submits that the question of variance as to the number of conspiracies is properly determineed by the court. The rationale underlying the foregoing assertion is multifaceted.

First. Although questions of fact are in issue, the question to be resolved is a procedural one. By analogy, none would argue that a Fourth Amendment suppression motion should be resolved by the jury. Although conflicting testimony may be elicited, and factual determinations are essential to any ruling, the decision is universally recognized as one for the court. Notwithstanding the Sixth Amendment gua[illegible]tee of jury trial, and that the suppression ruling is likely to be dispositive of the case, the issue is withheld from the jury for at least three reasons:[22] (1) the controlling legal principles are technical and complex, and hence are within the peculiar expertise of judges, not laymen; (2) there is a strong desire for uniformity of treatment and consistency of result as a matter of judicial policy; and (3) the jury's attention might be diverted from the ultimate question of individual guilt. Each of these reasons is fully applicable to the question of variance.

Second. The American tradition of eschewing special interrogatories in criminal cases, *see Spock, supra,* 416 F.2d at 180-83, prevents reviewing courts from ascertaining that the jury followed instructions. *See* note 7, *supra.* General verdicts are preferred so that a jury, by interposing its conscience, can serve as a bulwark against oppression. In conspiracy cases, however, where instructions tend to be long and convoluted and the danger of "spillover" contaminating a given co-defendant's verdict is ever present, the policy against special interrogatories tends to defeat its underlying purpose. Aside from so-called

22. There is an obvious fourth reason, which is peculiar to the nature of a suppression inquiry: testimony on the motion may be inadmissible on the merits, and thereby prejudice the accused. But absent the other three reasons, a two-stage trial — where one jury determines the suppression motion, and another the merits — could preserve the "factual" issues attending suppression motions for determination by the accused's peers.

"political" cases, where that purpose might be served, the insistence upon general verdicts permits jurors to imagine that one of the conspiracies found is major, and thereupon convict its participants; and as to those defendants who belong solely to the lesser conspiracies, the more discriminating jurors vote to acquit, the others vote to convict. When this happens, the conspiracy found is not the conspiracy pleaded; the jurors have not fulfilled their solemn obligation to apply to the evidence the law given by the court.

Third. Resolution of the variance question by lay jurors is necessarily a sham. Jurors are not trained experts in the law of conspiracy. They have not pondered upon wheel and chain metaphors. That they will not acquit on the basis of variance when confronted with overwhelming evidence of guilt as to multiple conspiracies had been counsel's invariable experience. No refutation of that generalization is to be found in media accounts, personal memoirs, or case reports. When after a long trial twelve citizens retire to deliberate, they search for a conspiracy, any conspiracy; it need not be the one pleaded. If more than one has been proven, it is deemed of no great consequence. Jurors do not appreciate the difficulties in designing a defense, and the prejudice to trial strategy that flows from the variance. Consequently, they either lump all the conspiracies as one, or the prime conspiracy yields convictions, the secondary does not.

Although there can be no direct confirmation of the foregoing assertions, there is compelling indirect proof. It is simply inconceivable that in virtually every case the government's theory of a conspiracy's dimensions has accorded with reality except as to those individual defendants not convicted. The blunt truth is that juries are unable to draw the fine distinctions which are critical to determining variance.

Fourth. Assuming that a jury could rationally determine the existence of variance, it is unable to determine that the variance found has been prejudicial. Indeed, there is no way in which a court could instruct on the issue of prejudice. When, as here, the court instructs on variance, it necessarily is determining that as a

matter of law, any variance which might be found is prejudicial. In a complex multi-defendant case such an instruction, if there were any chance that the jury could and would obey, must compromise the government's interests as to at least some of the co-defendants.

For these reasons, variance in conspiracy cases must be resolved by the court, or not at all. *See generally* P. Devlin, *Trial by Jury*, chaps. 4, 5 ("The Control of the Jury") (University Paperbacks ed., 1966); *also see* note 19, *supra*.

Petitioner submits that resolution of the variance question by the court requires no novel procedures. Trial judges are already familiar with the problem. They are required to make preliminary rulings on motions to dismiss and requests for instructions. Under the prevailing practice, their decisions reflect a determination as to whether a prima facie case has been made both pro and contra. If the government has adduced evidence upon which a jury might find no variance, a motion to dismiss is denied. If there is evidence upon which a jury might find variance, an instruction is given.

Proper resolution by the court can be a mplished by determining the weight of the evidence, rather than the presence of contradictory evidence. Resolution can be accomplished before, during, or after trial. Before trial, statements of expected proof can be examined. To the extent that disclosure of such statements might transcend limitations on discovery, they can be received in camera. Thereafter, the court could rule, with or without an evidentiary hearing, just as is done with suppression motions. During trial, the pretrial ruling can be revised if crucial evidence is at variance with the statements of expected proof. At the conclusion of trial, the judge is in a position to make a final ruling, with subsidiary findings if appropriate, as to the weight of the pertinent evidence. In making its preliminary and final rulings, the court is in a position to evaluate probable prejudice, and thus to warn the prosecutor of the risk he may run. Whatever inadequacies may exist in this procedure, they are necessarily dwarfed by the prevailing practice in which the

government's prima facie showing of no variance is sufficient to remove the question from the court's purview and submit it to the jurors, who are unable to properly resolve it.

B. Assuming arguendo that in a special case it would be proper to submit the question of variance to the jury, in petitioner's case it was not. The evidence clearly pointed to the existence of three separate and distinct conspiracies, two of them concerned with wholesale distribution of heroin in New York; the third—by which the government sought to link the two—concerned with retail distribution. Although a timely motion had been made for court determination of the variance question, the issue was ultimately submitted to the jury. The jury's verdict is made consistent if they failed to agree as to the linkage, and were convinced that the uncontested McNeil retailing scheme and the Jenkins' wholesaling conspiracy were proved.

There exists no permissible means for uncovering the jury's logic. They may have been unconvinced of Cameron's participation in crime—although the government's evidence of his involvement was substantial. But if they were not convinced of Cameron's participation, how could they have found, as the assistant argued at sentencing, that petitioner had been Cameron's agent? And if the jury's division was premised on conflicting views as to whether Cameron's operation was part and parcel of a Jenkins-McNeil conspiracy, then necessarily some of the jurors found variance, and were therefore obliged to vote acquittal for all three remaining defendants. The theory adopted by the Court of Appeals, "cure by verdict", is no more legitimate here than in a case of misjoinder—where it is

> "a roughshod device designed to determine whether the jury has followed the court's instructions and charge. In deciding whether any prejudice has stemmed from joinder, the appellate court looks to the verdict; acquittal of a defendant on any count cures any error. The theory assumes that because the jury has been selective in its verdict, it must have been alert throughout the trial and kept the evidence separate. But

> this reasoning assumes that the jury's verdict was in accord with the weight of the evidence. Such an assumption is unwarranted; after all, an acquittal on a strong count might be combined, in the case of an inattentive jury, with conviction on a weak count. More important, the theory of cure by verdict ignores the possibility that, had there been no prejudice from the joinder, the defendant might have been acquitted on all counts."

Note, 74 Yale L.J. 553, 555 (1965) (footnotes omitted).

In the instant case, there exists a strong possibility that the jury misconstrued or misapplied the court's instruction. Where it is impossible to ascertain that the jurors properly applied the law, reversal is required. *Stromberg v. California,* 283 U.S. 359, 370 (1931). Thus even if the variance question might be submitted to the jury in a special case,[23] the ambiguous verdict in this case is proof positive that the trial court should have resolved the question, and that the appellate court should not have deferred to the jury's purportedly careful findings.

III. THE "HARMLESS ERROR" DOCTRINE CANNOT BE INVOKED WHERE (1) THE TRIAL COURT HAS FOUND A SUBSTANTIAL PATTERN OF PROSECUTORIAL MISCONDUCT, (2) THE EVIDENCE OF GUILT, ALTHOUGH QUANTITATIVELY SUBSTANTIAL, IS QUALITATIVELY SHABBY, AND (3) THE JURY'S MIXED VERDICT INDICATES THAT INSTRUCTIONS WERE NOT FOLLOWED.

Appellate findings of harmless error have never been sanctioned as a substitute for a fair trial. To the contrary, error can be non-prejudicial only when two stringent criteria are fulfilled: (1) the conduct of the trial as a whole must have been fair, albeit imperfect; (2) absent the error found, the verdict would not have

23. *Cf. Grunewald, supra* (limitations properly submitted to jury under circumstances of the case).

been altered. Where these limitations on invocation of the doctrine are diluted, trials which undermine fundamental notions of justice are tolerated.

We are not prepared to discard the presumption of innocence. *Tot v. United States,* 319 U.S. 463 (1943). Nor the restrictions on governmental activities enshrined in the Fourth Amendment. *Katz v. United States,* 389 U.S. 347 (1967); *Weeks v. United States,* 232 U.S. 383 (1914); *Boyd v. United States,* 116 U.S. 616 (1886). Nor the privilege against self-incrimination. *Massiah v. United States,* 377 U.S. 201 (1964); *Bram v. United States,* 168 U.S. 532 (1897); *Boyd, supra.* Nor the right of confrontation. *Bruton v. United States,* 391 U.S. 123 (1968; *Kirby v. United States,* 174 U.S. 47 (1899). Were we to do so, some offenders might be punished who otherwise would escape justice. But that punishment would be exacted at the cost of everyone's freedoms. *Olmstead v. United States,* 277 U.S. 438, 485 (1928) (Brandeis, Jr., dissenting); *Boyd, supra.* As Benjamin Franklin would put it, we would pay too much for the whistle of criminal convictions. And we do pay too much when harmless error findings are tolerated as substitutes for fair trials or considered appellate review.[24]

24. In determining that the verdict would not have been altered, an appellate court is substituting its own judgment for the unexercised judgment of the jury. If such substituted judgment is liberally allowed, the Sixth Amendment guarantee of jury trial is defeated. In order to minimize the friction with jury trial and due process-fair trial rights which inheres in the harmless error doctrine, this Court has insisted that the error be deemed harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 24 (1967).

The error found in the instant case — prosecutorial assertion that the government could have called 300 additional witnesses; see ABA Standards Relating to the Administration of Criminal Justice: *The Prosecution Function,* §§5.8(d) 5.9 (1971) — even if viewed in isolation, is not a trivial one. As the magnitude of the error increases, satisfaction of the *Chapman* standard requires a corresponding increase in the quantity and quality of the proof of guilt. But in petitioner's case, because the quality of the evidence was questionable, the court below eschewed characterizing it as "overwhelming." *Cf.* Note, 74 Yale L. J. 553, 555-56 (1965). The court's failure to specifically find that the verdict could not have been altered, and its refusal to address itself to the trial court's specific findings of a pattern of prosecutorial misconduct, invite the conclusion that the doctrine has been "applied as a rubric to uphold [a] conviction with no more than a *pro forma* review." *Id.*

Beyond the constitutional restrictions which serve to safeguard the citizenry from oppression, this Court and leading professional organizations have established limitations on prosecutorial zeal so as to guarantee that trials are substantially fair. The salutary rationale underlying these standards for prosecutorial conduct is that in a criminal prosecution, the government's "interest is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). See generally, *Giglio v. United States*, 405 U.S. 150, 153-54 (1972) and cases cited therein.

A. Petitioner's trial was infected with repeated instances of prosecutorial misconduct, which rise to the level of a pattern. Time and again the trial judge found cause to "condemn" the assistant's actions and attitude. The instances presented in the Statement of the Case are but the tip of an iceberg. The trial judge's extraordinary exclamation that he had never been so "tortured," that he had suffered "direct and indirect pressures," precludes any reviewing court from treating the error found as an isolated instance. It was the culmination of an intentional course of misconduct.[25]

Over and above the patently prejudicial closing argument, the discovery violations set forth in the Statement of the Case, and the mysterious "direct and indirect pressures" applied to the trial judge, the assistant's persistent characterization of the defendants and their attorneys as New Yorkers constituted an unprofessional appeal to the jurors' regional prejudices. ABA Standards, *supra* note 24. A defendant removed from his home town—where the major criminal infranctions allegedly transpired—for trial in theDistrict of Columbia, cannot receive a fair

25. In defense of his allusion to numerous uncalled witnesses, the assistant declared, "Your Honor, I have heard this argument made by prosecutors before." Such being the case, the Court of Appeals at a minimum should have informed the legal community that such argument will not be tolerated. But the court refused to do so. It acknowledged error in a memorandum opinion which may not be cited as precedential authority. *See* Local Rule 8(b) for the District of Columbia Circuit, 511 F.2d 447.

trial if the repeated thrust of the prosecution goes not to his culpable conduct, but instead to the inflamatory insistence that the conspiratorial objective of this stranger was to corrupt the good people of the Nation's Capital by distributing the most dangerous of narcotics. The record leaves no doubt that this was a case in which the prosecutor's overriding ambition was to win; in which the standards of conduct demanded by this court, the trial court, and the American Bar Association were systematically violated. The situation and the remedy cannot be distinguished from that found in the leading case:

> . . . we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative impact upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded.

Berger, supra, 295 U.S. at 80.

B. Petitioner concedes that the evidence of his guilt was quantitatively substantial. Qualitatively, however, it was shabby. All of the consequential evidence was contained in the testimony of Individuals who were drug addicts at the time of their alleged observations, whose moral standards were all but non-existent, and whose testimony was not merely elicited by very generous bribes, but was offered under the threat of requests for substantial sentences if it did not conform to the prosecution's expectations. *See* note 9, *supra.* The quality of such evidence can never compel a jury conviction. *Cf. Napue v. Illinois,* 360 U.S. 264 (1959) (jury's estimate of the truthfulness and reliability of witnesses may be determinative of verdict). Where additionally, significant error has been found, and that error was not isolated, but was part of a pattern discerned by the presiding judge, it is inconceivable that a reviewing court can be confident the jury would have found guilt beyond a reasonable doubt.[26]

26. Judge Friendly has stated that "the test [for "harmless error"] on collateral attack generally should be not whether error could have affected the

C. As previously stated, the jury's inability to agree as to Cameron's guilt indicates that some jurors found multiple conspiracies, and voted convictions only on the conspiracy they believed to be more prominent. If such be the case, the careful evaluation of the evidence asserted by the Court of Appeals is illusory, for the evaluation was made contrary to the court's instructions. In any event, automatic "cure by verdict," *see* Note, 74 Yale L.J. 553, 555 (1965) (quoted pp. 27-28, *supra*), is a pernicious doctrine, especially when invoked in tandem with the harmless error doctrine. If the court is to draw inferences from the jury's verdict, as the court below did, it must explore the full range of reasonable inferences.

By selecting a preferred inference, and declaring that none other is possible, the court has erected an impenetrable barrier against appellate relief from unjust conviction. If the jury convicts all defendants, the evidence almost invariably would permit—*but not compel*—a facile finding of sufficient strength to cure error. If the jury splits its verdict, its discernment is presumed to cure error. Either way, the verdict is a substitute for a meaningful appeal.

At least in this case, the verdict cannot be deemed a cure absent evaluation of the strength of the evidence against Cameron and a careful determination of the reasonableness of alternative explanations for the disagreement as to him. But by the court's own admission, the only interpretation of the verdict which it would entertain was the curative one. Given the

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result but whether it could have caused the punishment of an innocent man." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 157 n.81 (1972). Implicit in his position is the view that on direct appeal, the proper inquiry goes to the probable impact of error on the result, and not to the probability of guilt. Probability that the evidence would compel a rational jury to find guilt is different from the probability of guilt in fact. The former, in Friendly's formulation, relates to the evaluation of prejudice on direct appeal; the latter, on collateral attack.

The Court of Appeals' finding of "strong" evidence of petitioner's guilt might be appropriate if this were a habeas proceeding; but the court clearly misapplied the harmless error test in not reaching the question of the certainty of a guilty verdict in the absence of the error found.

reasonable doubt that exists as to the meaning of the verdict, there can be no abiding confidence that absent the error found, and the errors ignored, the jury would have convicted petitioner.

D. The harmless error doctrine serves a valuable and legitimate function. It disallows frivolous appeals where error is isolated, the evidence of guilt is overwhelming, and the nature of the error is such that in its absence, the verdict could not have been different. When invoked promiscuously, however, the doctrine converts the appellate process from a search for justice into nothing more than a lottery; it derogates the fair trial guarantee implicit in the due process clause of the Fifth Amendment, and the jury trial guarantee of the Sixth Amendment. To prevent such degradation of the appellate process, the doctrine must only be invoked upon a searching examination of the full record.

In conducting that examination, three types of error may be found. Some errors are necessarily beyond the reach of the doctrine. *E.g.*, admission of a coerced confession; denial of counsel. Some errors are invariably trivial in their impact. *E.g.*, erroneous admission of hearsay on a collateral issue, as to which there was substantial independent evidence properly introduced. Some errors entail a significant probability of prejudice. *E.g.*, arguing that 300 or more additional witnesses could have been called. Where this last type of error is found, the declaration that it is harmless must reflect a meticulous scrunity of the record.

Had the court below carefully analyzed the record, its opinion could not reasonably have ignored the trial judge's repeated excoriation of the assistant's tactics. It could not have ignored the obvious deficiencies in the credibility of the government's self-styled "major witnesses." It could not have ignored the substantial probability that the jury misapplied the court's instructions, and in fact, was not agreed that the government had proven Jenkins' and petitioner's participation in a single continuing conspiracy throughout the period described in the indictment.

The harmless error doctrine is misapplied when it is used to cleanse a malignant record. The Court of Appeals, in finding

harmless error, stretched the limits of that doctrine beyond the breaking point. Its loose application of the doctrine was accomplished in derogation of the two essential criteria implicit in the doctrine's name: that the trial was undoubtedly fair,[27] and that in the absence of error, the jury undoubtedly would have reached the same result. The facility with which the court below found harmless error demonstrates the urgent need for a reaffirmation by this Court of the doctrine's proper limits and functions.

IV. THE 'DANGEROUS SPECIAL DRUG OFFENDER' SENTENCING PROVISIONS OF TITLE 21, UNITED STATES CODE, SECTION 849, ON THEIR FACE AND AS APPLIED TO PETITIONER, ARE REPUGNANT TO THE BILL OF ATTAINDER, DUE PROCESS, DOUBLE JEOPARDY, INDICTMENT, JURY TRIAL, CONFRONTATION, PUBLIC TRIAL, AND/OR CRUEL AND UNUSUAL PUNISHMENTS CLAUSES OF THE CONSTITUTION.

The statute here challenged reflects a congressional desire to impose drastically enhanced sentences on narcotics offenders who are found to be both "special" and "dangerous" within the meaning of the statute. "Special" offenders are those who, upon a preponderance of information available to the sentencing court, meet any of three defining paragraphs of subsection (e): recidivists, (e)(1); persons who have adopted drug dealing as a vocation, (e)(2); and those who either played a central role in a large conspiracy, or aggravated a conspiratorial offense through force or bribery, attempted or accomplished, (e)(3). In addition to finding that the prisoner is a special offender, the court

27. In addition to the prosecutor's repeated misconduct, the fairness of petitioner's trial was compromised by the massive quantities of inflammatory testimony admitted to prove the existence and nature of McNeil's retail operation in Washington, when the sole contested issues revolved around Jenkins' and Cameron's wholesale activities in New York. See Section I(E), *supra*.

must make findings as to the separate element of "danger." Subsection (f); *see United States v. Duardi,* 384 F.Supp. 856, 860 (W.D. Mo. 1973) (construing similar provisions of 18 U.S.C. Section 3575). A special offender is dangerous if the probability of future criminal conduct is deemed so substantial that protection of the public requires a sentence substantially in excess of the maximum prescribed for the offense tried.

Section 849 can only be invoked at the discretion of the prosecutor. Subsection (a); *United States v. Noland,* 495 F.2d 529 (5th Cir. 1974). This is done by filing in camera and serving an application, prior to trial or entry of guilty plea, setting forth with particularity the information upon which the government believes an accused to be both special and dangerous. Subsection (a). *See; United States v. Tramunti,* 377 F.Supp. 6, 10 (S.D.N.Y. 1974); *cf. United States v. Kelly,* 384 F.Supp. 1394, 1399 (W.D. Mo. 1974) (mere tracking of defining language in subsection (e) is insufficient to meet particularity requirement of subsection (a); 18 U.S.C. Section 3575). In the event of conviction, the application may be received by the sentencing judge, who thereafter conducts a mini-trial, at which the government attempts to prove the facts pleaded in the application. Subsection (b).

The rules of evidence at this hearing are greatly relaxed. *Id.; see also* Section 850. Hearsay is generally admissible, and the facts found may be supported by sealed evidence not disclosed to the prisoner. Subsection (b). The court is not limited to the information adduced at the hearing, but may also rely on evidence brought out at trial on the underlying offense. *Id.* The burden of proof is met with a "preponderance of the information." *Id.* An adverse ruling, or a favorable ruling coupled with a less than maximum enhanced sentence, may be appealed by the government. Subsection (h).

In construcing Section 849, or the substantially identical sentence-enhancing provisions of Title 18, United States Code, Section 3575, the lower courts have demanded strict compliance with the statutory procedures. *Noland, supra; Kelly, supra;*

United States v. Duardi, 384 F.Supp. 874, 877 & n. 2, 879 (W.D. Mo. 1974); *Tramunti, supra*. The court below did not. Additionally, the last of the *Duardi* opinions held, as petitioner here urges, that the statutory scheme (there, Section 3575) was constitutionally deficient.

Section 849 is an inventive amalgam containing elements of criminal law, civil law, and administrative law. It is criminal law insofar as its invocation is at the sole discretion of the prosecution, its application requires specific findings as to two statutory elements, and its consequence is a dramatic increase in the penalty to which the prisoner is subject. It is civil law in that there is no right to public jury trial after indictment and the burden of persuasion is met by a preponderance of the information, rather than proof beyond all reasonable doubt. It is administrative law in that the standards for appellate review are those traditionally associated with judicial review of agency action, the rules of evidence are limited solely by the purpose of the hearing, not by the traditional safeguards against unreliability, and the exercise of discretion is circumscribed by a requirement that specific supportive findings be made.

The evils to which the statute is directed could have been reached, with substantially the same effect, through traditional legislative devices. The maximum available sentence could have been increased for all narcotics offenses. Discretionary factors to be considered in sentencing could have been set forth in the statute. Appellate review of sentencing, assuming it would confound neither the double jeopardy nor due process clauses, could have been specifically authorized with reference to the favored discretionary criteria. But the Congress chose not to follow the orthodox route. It would not leave sentencing discretion exclusively where it has always been, in the judiciary. It would not, in the alternative, make available to the prisoner the full panoply of procedural protections constitutionally guaranteed the criminally accused. The evil which it perceived was deemed to justify these extraordinary departures from prior practices. However commendable the congressional purpose

might be, petitioner submits that the resulting product is totally alien to our criminal justice system and to our constitutional form of government.

A. The challenged section is prima facie unconstitutional. The sweeping definitions set forth in subsections (e)(2) and (3) are so vague as to deny adequate notice, to judge or prisoner, as to what behavior will be reached. For example, subsection (e)(2) requires that the prisoner has "manifested special skill or expertise" as part of a pattern of dealing in narcotics. No guidance is offered, and none exists, for distinguishing the *ordinary* skill or expertise from the *special*. The statutory characterizations of skill or expertise involve qualities and capabilities which, in general, are common in varying degrees to all humanity. It might well be argued, as the prosecutor argued below, that the mere fact of participation in a narcotics distribution conspiracy is sufficient proof of special skill or expertise. Conversely, it might be argued that the mere fact of apprehension by law enforcement authorities is equivalent proof of the absence of such traits. A much more informative criterion is needed.

It would be difficult to conceive of a standard more vague than that here enacted. Indeed, subsections (e)(2) and (3) are intentionally vague. They are designed to visit recidivist consequences upon prisoners whose alleged additional misconduct the government cannot or will not prove in a jury trial. As is the case with the virtually identical procedures and language of 18 U.S.C. Section 3575, the enhanced sentencing scheme "is designed to reach the professional criminal who is a repeating offender but who may not have a prior conviction record." Letter from Assistant Attorney General Wilson to the Chairman of the House Judiciay Committee, Sept. 9, 1970, printed in H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. (1970).

To the extent that the determination of dangerous special offender status and the ensuing infliction of harsh punishment are accomplished without benefit of indictment or jury trial for specific offenses, Section 849 is repugnant to the Bill of At-

tainder.[28] Indictment, and Jury Trial provisions of the Constitution, and entails the infliction of Cruel and Unusual Punishment. *See Tate v. Short,* 401 U.S. 395 (1971) (statutory ceiling on imprisonment for any substantive offense must be the same for all defendants); *cf. Furman v. Georgia,* 408 U.S. 238, 309-310 (1972) ("capriciously selected random handful") (Stewart, J., concurring). To the extent that the court may act on the basis of sealed information obtained from secret sources, the section is repugnant to the Confrontation, Public Trial, and Due Process clauses. To the extent that the government may choose to bring a separate prosecution for the same misconduct upon which special offender status is predicated, the section is in conflict with the prohibition against Double Jeopardy.[29] To the extent that the section imposes punishment on members of a class for their status, for what they are (*e.g.*, skillful) rather than for what they did, it contravenes the Cruel and Unusual Punishment clause. *See Robinson v. California,* 370 U.S. 660 (1962); *cf. Lambert v. California,* 355 U.S. 225 (1957). To the extent that sentencing discretion is partially removed from the judiciary and given to the executive branch, the section violates the Due Process clause and the Separation of Powers doctrine. To the extent that the section permits governmental appeal from a sentencing decision it is totally alien to the federal judicial system and presents Due Process and Double Jeopardy problems.

The manifold departures of this section from the cornerstones of our criminal justice system, as described above, are so patent

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28. *See Cummings v. Missouri,* 4 Wall. 277 (1867); *Ex parte Garland,* 4 Wall. 333 (1867); *cf. United States v. Brown,* 381 U.S. 437 (1965.

29. It is obvious that in the traditional sense, jeopardy does not attach in the absence of indictment, arraignment, or the receipt of evidence. Nonetheless, where the government puts facts in issue in what purports to be a judicial proceeding, and demands that upon proof of those facts the prisoner be liable to an additional decade behind bars, form would be exalted over substance, and words would lose their common meanings, were it contended that jeopardy had not attached.

as to need no further citation. Legislation such as Section 849, enacted in a moment of hysteria, tends to be subversive of the Nation of Laws it was intended to protect.

B. Assuming that Section 849 can be reconciled with the Constitution, its application to petitioner has been arbitrary and capricious, in derogation of the Due Process clause. The application of the prosecutor, and the findings of the court, bear no relationship to the requirements of the statute.

1. The initial application, which was never amended, did not set forth with particularity the facts upon which the government alleged that petitioner was either dangerous or a special drug offender within the meaning of the statute. The application merely tracked the defining characteristics set forth in subsection (e)(3): petitioner allegedly conspired with three or more persons and did, or agreed to "initiate, organize, plan, finance, direct, manage, or supervise" the narcotics distribution scheme. Which of the verbs was applicable, and the factual basis for that conclusion, the government's application did not say. As such, it was fatally deficient for not meeting the "particularity" requirement of subsection (a). *See Noland, supra; Tramunti, supra; cf. Duardi, supra* at 879; *United States v. Edwards,* 379 F. Supp. 617 (M.D. Fla. 1974). Accordingly, the sentencing court was without jurisdiction to award an enhanced sentence. Doubly so, for no particular facts which might support a finding as to the separate element of dangerousness pursuant to subsection (f) were set forth in the application. *See Duardi, supra* at 880.

2. Assuming arguendo that the jurisdictional requirements of subsection (a) were met, the jurisdictional requirements of subsection (b) were not. At the sentence hearing, the government offered no elaboration as to the particular conduct upon which it sought findings of special offender and dangerousness. The government conceded that petitioner was nothing more than an unskilled messenger, insofar as his conspiratorial role was in issue. The court accepted that concession, specifically finding

that petitioner was not "one of the actual leaders."

The government did urge that petitioner's failure to file income tax returns provided a basis for enhanced sentence. But the government never established that petitioner was under a duty to file income tax returns for the years in question. Assuming, however, that petitioner was under such a duty, the question is absolutely irrelevant to a subsection (e)(3) finding. Only where the government has pleaded subsection (e)(2) is the source of the prisoner's income in issue. *See Duardi, supra* at 877 n.2.

Ultimately, the court made no particularized findings as to which, if any, of the activities pleaded was adequately proved. Whichever of the statutory defining verbs was deemed applicable to petitioner is, to this day, a secret shared only by the prosecutor and the judge. The secret cannot be learned from the most careful scrutiny of the record in this case. All the court did was rubber stamp the government's application, thereby tracking the statute by reference. Neither pleadings nor findings which merely repeat the conclusory language of the statute satisfy the particularity requirements of subsections (a) and (b), respectively. *See United States v. Kelly, supra* at 1399. Due process of law requires much more.

The want of particularity reflects the inapplicability of Section 849 to petitioner. The clear congressional intent was to enhance the sentences of leaders in the criminal enterprise. Petitioner was not a leader; he was no more than a messenger. He was not the mastermind; he offered no special skills; he was certainly not the financier. The government admitted as much. It urged that petitioner's role in the conspiracy was one that had to be filled, but it never intimated that unusual or special skills were required to fill a job involving meeting people, delivering merchandise, and receiving payment. To hold that such activities are reached by subsection (e)(3) is to apply the statute arbitrarily and capriciously. It is equivalent to holding that all participants in a narcotics distribution conspiracy involving four or more people are necessarily special drug offenders, if and only

if the prosecutor, before trial, properly requests enhanced sentences. Even if a tortured reading of the Constitution would tolerate such a procedure, the Congress did not so legislate.

3. The sentencing court's finding of dangerousness involved a clear misconstruction of subsection (f). The plain statutory purpose is "protection of the public from further criminal conduct by the defendant." *Id.* The element of danger, under the legislative scheme, relates to perceived need for extended preventive detention. *Compare* District of Columbia Preventive Detention Law, D.C. Code Sections 23-1322(a)(1), -1322(b)(2)(B) (Supp. IV 1971). Congress intended that one who is deemed likely to return to criminal ways at the first opportunity should not be given an early opportunity.

In petitioner's case, the sentencing court disregarded the critical consideration clearly set out in subsection (f), and substituted its own definition of dangerousness. In the court's view, the only relevant factor was the danger presented by the drug — heroin — instead of the danger presented by petitioner if released to the community at an early date. The sole particular finding with respect to danger was the judge's declaration, "[H]e did, in fact, participate in a conspiracy . . . which involved the distribution of this narcotic drug, which, in fact, is the most *dangerous*, according to the knowledge of the court." No other particularized finding was made; no evidence was offered upon which the required finding could be made. No evidence could properly have been offered, because the application failed to allege with particularity the basis for the government's view of petitioner's dangerousness. *Cf. United States v. Duardi,* 389 F.Supp. 861, 869 (W.D.Mo. 1973); same case, *supra* at 877 n.2.

Even if implied findings as to the need for preventive detention could meet the procedural requirements of subsection (b), none can be found in the record. The sentencing judge never intimated that this first offender posed a substantial risk of recidivism. To the contrary, the court's manifest intention was to exact added punishment in retribution for the heinousness of the crime, not to protect society from the depradations of a professional criminal.

Congress has provided for sentences which, in its judgment, are normally sufficient to meet the penological interests of the public. No trial judge is authorized to award an enhanced sentence on his personal belief that Congress underestimated the seriousness of a given crime. By looking to the dangerousness of the *drug*, and not of the defendant, the sentencing court usurped the legislative prerogative. It is clear that the term "dangerous" as used in section 849 relates to the nature of the prisoner, not the nature of his offense. Any contrary interpretation does violence to the English language, the intent of Congress, and the Due Process clause of the Constitution.

Section 849 cannot withstand the constitutional scrutiny petitioner seeks. Assuming arguendo that it could, the contents of the prosecutor's application, the conduct of the hearing, and the findings of the sentencing court, were travesties of the procedures required by the statute. The awarding to petitioner of "dangerous special drug offender" status and enhanced sentence was arbitrary and capricious. Accordingly, petitioner's clearly erroneous sentence should be vacated.

CONCLUSION

Petitioner presents to the Court four issues. Each relates to recurring problems of major importance in the administration of criminal justice by the federal judiciary. The first three suggest the exercise of supervisory powers so as to provide needed guidance to the lower courts and practicing attorneys in the quest to improve the quality of justice in a free society. The fourth presents major constitutional questions of first impression, which should be promptly resolved so that the Congress can act with definitive knowledge of the manner in which the police power can be properly exercised for the protection of the public.

For the foregoing reasons, petitioner respectfully prays that the writ issue.

Respectfully submitted,

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AARON J. JAFFE

Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

No. 74-1333

United States of America

v.

Robert A. Sutton, Appellant

No. 74-1334

United States of America

v.

Zebadee Jenkins, Appellant

No. 74-1375
United States of America

v.

Zebadee Jenkins, et al., Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: LEVENTHAL and ROBINSON, Circuit Judges and MILLER,* Judge, United States Court of Customs and Patent Appeals

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this court that the judgments of the District Court appealed from in these causes are hereby affirmed, for the reasons set forth in the attached memorandum.

The duty of counsel is fully discharged without filing a suggestion for rehearing en banc unless the case meets the rigid standards of Federal Rule of Appellate Procedure 35(a).

Per Curiam
For the Court
[*Sgd*] Hugh E. Kline
Clerk

*Sitting by designation pursuant to 28 U.S.C. §293(a)

Memorandum

Defendants Sutton and Jenkins appeal from their convictions on a single count of conspiracy to distribute heroin and other substances in violation of 21 U.S.C. §§841(a), 846(1970). The indictment charged 17 persons with conspiracy. All 13 of the District of Columbia defendants pleaded guilty. The 4 New York defendants stood trial. One minor figure obtained a judgment of acquittal at the close of the Government's case, the appellants

were convicted, and the jury could not reach a verdict with respect to defendant Charles Cameron (often referred to at trial by the nickname Swayzie).

Two broad grounds for reversal are urged by appellants: (1) that the proof established two separate conspiracies rather than a single conspiracy and was thus fatally defective under *Kotteakos v. United States,* 328 U.S. 750 (1946), and (2) that fair trial was denied as a result of prosecutorial misconduct.

After reviewing the record we find that there was evidence sufficient to present to the jury the issue whether there was a single conspiracy, even though at the beginning the source of supply was Jenkins and after a period of time the source came to be Cameron. Where there is adequate evidence, the question of single versus multiple conspiracies is one for the jury. *See* United States v. Vicars, 467 F.2d 452, 454 (5th Cir. 1972), *cert. denied,* 410 U.S. 967 (1973); United States v. Varelli, 407 F.2d 735, 746 (7th Cir. 1969), *cert. denied,* 405 U.S. 1040 (1972); Koolish v. United States, 340 F.2d 513, 526 (8th Cir.), *cert. denied,* 381 U.S. 951 (1965). The fact that the jurors did not agree on the guilt of Cameron as a member of the conspiracy tends to indicate, if anything, that they were reflecting on the charge emphasizing the necessity of finding that each of the defendants was a member of a single, continuing conspiracy.

We are unable to see any impropriety in the United States Attorney or other principal prosecutors attending a trial of such importance particularly at crucial moments which may have required them to make a judgment whether an interlocutory appeal should be taken. There is nothing in the record before us to show that any actions of the United States Attorney were impermissible or undercut the fairness of the trial.

We do find that the prosecutor was guilty of error when in the course of summing up he said that "we could have called 300 or 400 [other] witnesses." Government counsel on appeal puts it that this was mere hyperbole that would not be given credence by the jury. But, although the figure 300 may be taken as hyper-

bole, the statement might well be viewed as an assertion of fact that there were other witnesses that could have been called. However, the trial judge promptly gave an appropriate cautionary instruction to the jury. The jury's willingness to decide this case on the testimony given in the courtroom, rather than on any speculation that other witnesses might have been called, is indicated by the verdict as to Cameron, where the jury was unable to agree that the evidence was sufficient to show guilt beyond a reasonable doubt. In view of the corrective instruction and the strong case against appellants, we do not believe that the prosecutor's statement constituted a prejudicial error.

We have reviewed the other summation statements challenged by appellants and the charges of Government withholding of Jencks material and find no basis for reversal.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

Criminal
No. 534-73

United States of America

v.

No. 3— ROBERT A. SUTTON

On this 20th day of February, 1974 came the attorney for the government and the defendant appeared in person and by counsel, Donald J. Sheehy, Esquire.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of CONSPIRACY TO DISTRIBUTE A CONTROLLED SUBSTANCE (IN VIOLATION 21 USC 846) as charged in count 1 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of SIX (6) YEARS TO EIGHTEEN (18) YEARS, with a special parole term of Three (3) years.

IT IS ORDERED that the Clerk deliver a certified copy of this

judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

[*Sgd*] Charles R. Richey
United States District Judge

The Court recommends commitment to a Federal Institution.

A TRUE COPY, Certified this 21st day of Feb. 1974
JAMES F. DAVEY, Clerk By [*sgd*] Deputy Clerk

APPENDIX C-1

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Before: Leventhal and Robinson, Circuit Judges; Jack R. Miller*, Judge U.S. Court of Customs and Patent Appeals.

ORDER

On consideration of appellants' motion for leave to file a petition for rehearing *en banc*, it is

ORDERED by the Court that the motion is granted and the Clerk is directed to file appellants' lodged petition for rehearing and petition for rehearing *en banc*.

Per Curiam

For the Court:

[*Sgd*] Hugh E. Kline, Clerk

****

May 20, 1975

APPENDIX C-2

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

****

Before: Leventhal and Robinson, Circuit Judge; Jack R. Miller*, Judge U.S. Court of Customs and Patent Appeals.

ORDER

On consideration of appellants' petitions for rehearing, it is

ORDERED by the Court that appellants' aforesaid petitions are denied.

Per Curiam

For the Court:

[*Sgd*] Hugh E. Kline, Clerk

May 20, 1975

APPENDIX C-3

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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ORDER

Appellants' petition for rehearing *en banc* having been transmitted to the full Court and no Judge having requested a vote thereon, it is

ORDERED by the Court *en banc* that appellants' aforesaid petition for rehearing *en banc* is denied.

For the Court:

[*Sgd*] Hugh E. Kline, Clerk

May 20, 1975

APPENDIX D

§849. Dangerous special drug offender sentencing.

(a) Notice to court by United States Attorney.

Whenever a United States attorney charged with the prosecution of a defendant in a court of the United States for an alleged felonious violation of any provision of this subchapter or subchapter II of this chapter committed when the defendant was over the age of twenty-one years has reasons to believe that the defendant is a dangerous special drug offender such United States attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo contendere, may sign and file with the court, and may amend, a notice (1) specifying that the defendant is a dangerous special drug offender who upon conviction of such felonious violation is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special drug offender. In no case shall the fact that the defendant is alleged to be a dangerous special drug offender be an issue upon the trial of such felonious violation, be disclosed to the jury, or be disclosed before any plea of guilty or nolo contendere or verdict or finding of guilty to the presiding judge without the consent of the parties. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, it may order the notice sealed and the notice shall not be subject to subpena or public inspection during the pendency of such criminal matter, except on order of the court, but shall be subject to inspection by the defendant alleged to be a dangerous special drug offender and his counsel.

(b) Hearing; inspection of presentence report; counsel; process; examination of witnesses; penalty; sentence.

Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felonious violation, a hearing shall be held, before sentence is imposed, by the court

sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing, the defendant and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felonious violation and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special drug offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felonious violation. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felonious violation. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

(c) Sentences for life or for a term exceeding twenty-five years.

This section shall not prevent the imposition and execution of a sentence of imprisonment for life or for a term exceeding twenty-five years upon any person convicted of an offense so punishable.

(d) Mandatory minimum penalties.

Notwithstanding any other provision of this section, the court shall not sentence a dangerous special drug offender to less than any mandatory minimum penalty prescribed by law for such felonious violation. This section shall not be construed as creating any mandatory minimum penalty.

(e) Special drug offender defined.

A defendant is a special drug offender for purposes of this section if—

(1) the defendant has previously been convicted in courts of the United States or a State or any political subdivision thereof for two or more offenses involving dealing in controlled substances, committed on occasions different from one another and different from such felonious violation, and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felonious violation, and less than five years have elapsed between the commission of such felonious violation and either the defendant's release, or parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous offense or another offense involving dealing in controlled substances and punishable by death or imprisonment in excess of one year under applicable laws of the United States or a State or any political subdivision thereof; or

(2) the defendant committed such felonious violation as part of a pattern of dealing in controlled substances

which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

(3) such felonious violation was, or the defendant committed such felonious violation in furtherance of, a conspiracy with three or more other persons to engage in a pattern of dealing in controlled substances which was criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or dealing, or give or receive a bribe or use force in connection with such dealing.

A conviction shown on direct or collateral review or at the hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of paragraph (1) of this subsection. In support of findings under paragraph (2) of this subsection, it may be shown that the defendant has had in his own name or under his control income or property not explained as derived from a source other than such dealing. For purposes of paragraph (2) of this subsection, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and fifty-week year, without reference to exceptions, under section 206(a)(1) of Title 29 for an employee engaged in commerce, and which for the same period exceeds fifty percent of the defendant's declared adjusted gross income under section 62 of Title 26. For purposes of paragraph (2) of this subsection, special skill or expertise in such dealing includes unusual knowledge, judgment or ability, including manual dexterity, faciliatating the initiation, organizing, planning, financing, direction, management, supervision, execution or concealment of such dealing, the enlistment of accomplices in such dealing, the escape from detection or apprehension for such dealing, or the disposition of the fruits or proceeds of such dealing. For pur-

poses of paragraphs (2) and (3) of this subsection, such dealing forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

(f) Dangerous defendants.

A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felonious violation is required for the protection of the public from further criminal conduct by the defendant.

(g) Appeal

The time for taking an appeal from a conviction for which sentence is imposed after proceedings under this section shall be measured from imposition of the original sentence.

(h) Review of sentence.

With respect to the imposition, correction, or reduction of a sentence after proceedings under this section, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review of the sentence or appeal of the conviction by the defendant by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant.

Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was baused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information — submitted during the trial of such felonious violation and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that reviewed but shall not otherwise foreclose the review of the sentence or the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of the abuse of the right of the United States to take such review. (Pub. L. 91-513, title II, 409, Oct. 27, 1970, 84 Stat. 1266.)

§850. Information for sentencing.

Except as otherwise provided in this subchapter or section 242a(a) of Title 42, no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence under this subchapter or subchapter II of this chapter. (Pub. L. 91-513, title II, 410, Oct. 27, 1970, 84 Stat. 1269.)

APPENDIX E

Model Penal Code

Section 5.03. Criminal Conspiracy

(1) *Definition of conspiracy.* A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:

(a) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such rime or an attempt or solicitation to commit such crime; or

(b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

(2) *Scope of conspiratorial relationship.* If a person guilty of conspiracy, as defined by Subsection (1) of this Section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime.

(3) *Conspiracy with multiple criminal objectives.* If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.

(4) *Joinder and venue in conspiracy prosecutions.*

(a) Subject to the provisions of paragraph (b) of this Subsection, two or more persons charged with criminal conspiracy may be prosecuted jointly if:

(i) they are charged with conspiring with one another; or

(ii) the conspiracies alleged, whether they have the same or different parties, are so related that they

constitute different aspects of a scheme of organized criminal conduct.

(b) In any joint prosecution under paragraph (a) of this Subsection:

(i) no defendant shall be charged with a conspiracy in any county [parish or district] other than one in which he entered into such conspiracy or in which an overt act pursuant to such conspiracy was done by him or by a person with whom he conspired; and

(ii) neither the liability of any defendant nor the admissibility against him of evidence of acts or declarations of another shall be enlarged by such joinder; and

(iii) the Court shall order a severance or take a special verdict as to any defendant who so requests, if it deems it necessary or appropriate to promote the fair determination of his guilt or innocence, and shall take any other proper measures to protect the fairness of the trial.

(5) *Overt act.* No person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

(6) *Renunciation of criminal purpose.* It is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a renunciation of his criminal purpose.

(7) *Duration of conspiracy.* For purposes of section 1.07(4) [time limitations]:

(a) conspiracy is a continuing course of conduct which terminates when the crime or crimes which are its object are committed or the agreement that they be committed is abandoned by the defendant and by those with whom he conspired; and

(b) such abandonment is presumed if neither the defendant nor anyone with whom he conspired does any overt act in pursuance of the conspiracy during the applicable period of limitation; and

(c) if an individual abandons the agreement, the conspiracy is terminated as to him only if and when he advises those with whom he conspired of his abandonment or he informs the law enforcement authorities of the existence of the conspiracy and of his participation therein.

Supreme Court, U. S.
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No. 75-48

In the Supreme Court of the United States

OCTOBER TERM, 1975

ROBERT A. SUTTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that the evidence established multiple conspiracies rather than the single conspiracy charged in the indictment; (2) that the alleged variance between the pleadings and the proof should have been resolved by the district court rather than by the jury; (3) that alleged prosecutorial misconduct constituted prejudicial error; and (4) that the dangerous special drug offender sentencing statute (21 U.S.C. 849) is unconstitutional on its face or as applied to him.

Following a jury trial in the United States District Court for the District of Columbia, petitioner and Zebadee Jenkins were convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 841(a) and 846. Petitioner was sentenced under the provisions of the dangerous special drug offender sentencing statute, 21 U.S.C. 849, to a term of six to eighteen years' imprisonment, to be followed by three years' special parole. The court of appeals affirmed (Pet. App. 47-50; 511 F.2d 448).

As petitioner concedes (Pet. 5), the evidence adduced at trial established that a retail narcotics operation under the auspices of David McNeil existed in the District of Columbia from May 1972 to April 10, 1973.[1] Until mid-December 1972, the retailers procured their heroin from Zebadee Jenkins, a cousin of McNeil residing in New York City. In January 1973, Charles Cameron became the retailers' principal supplier; Cameron continued to supply heroin until April 10, 1973, when the police arrested the retailers and seized a large quantity of heroin. Petitioner acted as a go-between, intermediating both the retailer-Cameron and the retailer-Jenkins transactions.

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[1] Seventeen persons were indicted in the District of Columbia on June 18, 1973, for conspiring to distribute heroin. Thirteen of those defendants, all of whom were members of the McNeil retail operation, pleaded guilty. The four defendants who went to trial were involved in the wholesale aspect of the conspiracy. Hazel Vento was granted a judgment of acquittal; Charles Cameron was granted a mistrial when the jury was unable to reach a verdict; Jenkins and petitioner were convicted.

1. Petitioner contends (Pet. 5-8, 14-18) that the evidence at trial established at least three distinct conspiracies rather than the single conspiracy charged in the indictment. The McNeil retail operation and the two wholesale suppliers, Jenkins and Cameron, petitioner argues, each involved a separate conspiracy. The evidence, however, when viewed in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), demonstrates an agreement and concert of action among McNeil, Jenkins and petitioner to distribute heroin in the District of Columbia through the McNeil retail operation.

The testimony at trial revealed that McNeil continued to purchase heroin from Jenkins even after Cameron became an additional source of supply (Tr. 1495-1511). That McNeil used two suppliers hardly transforms his operation into two or more conspiracies. There was but a single core operation, even though not all the actors participated in each transaction or knew all the details. See *Blumenthal* v. *United States*, 332 U.S. 539. The question to be resolved at trial was whether Cameron had so associated himself with the ongoing McNeil conspiracy that he became culpable for all of its acts or whether there was a separate McNeil-Cameron conspiracy. That question was put to the jury with an instruction that, if it found more than one conspiracy, it should acquit. The jury was unable to reach a verdict concerning Cameron despite the massive evidence of the Cameron-McNeil transactions, and, as the court of

appeals concluded, it thereby demonstrated that it understood its task and conscientiously carried it out (Pet. App. 49). The fact that the jury was unable to agree as to Cameron's participation in the conspiracy of which the other defendants, including petitioner, were convicted in no way impairs the validity of its conclusion regarding the other participants.

Petitioner alternatively contends (Pet. 13-22) that the Court should exercise its supervisory power and direct the federal courts to follow the provisions of the *Model Penal Code* in criminal conspiracy prosecutions. This is a request for the Court to forsake its task of making case-by-case adjudications and to pronounce a set of developed rules more appropriately left—as the draftsmen of the *Model Penal Code* intended—for consideration by legislatures. This Court has carefully forged the body of conspiracy law in dozens of cases spanning many decades.[2] If that body of law is to be swept away, as petitioner urges, the task should be accomplished by Congress rather than by the courts.

2. Petitioner urges this Court to require that the question of variance between the number of conspira-

[2] Many of these cases establish important procedural protections for those accused of conspiracy. See, *e.g.*, *Bruton* v. *United States*, 391 U.S. 123 (non-testifying co-conspirator's confession); *Ingram* v. *United States*, 360 U.S. 672 (requirement of knowledge); *Grunewald* v. *United States*, 353 U.S. 391 (concealment); *United States* v. *Bayer*, 331 U.S. 532 (overt act); *Kotteakos* v. *United States*, 328 U.S. 750 (single conspiracy must be proved); *Pinkerton* v. *United States*, 328 U.S. 640 (membership at time of substantive offense); *Glasser* v. *United States*, 315 U.S. 60 (proof *aliunde*).

cies pleaded and the number proved be determined by the court rather than by the jury (Pet. 23-28). But, as petitioner acknowledges (Pet. 23), the federal courts uniformly have held that this question properly is resolved by the jury. See, *e.g.*, *United States* v. *Brown*, 495 F.2d 593 (C.A. 1), certiorari denied, 419 U.S. 965; *United States* v. *Vicars*, 467 F.2d 452 (C.A. 5), certiorari denied, 410 U.S. 967; *United States* v. *Varelli*, 407 F.2d 735 (C.A. 7), certiorari denied *sub nom. Saletko* v. *United States*, 405 U.S. 1040; *United States* v. *Aiken*, 373 F.2d 294 (C.A. 2), certiorari denied, 389 U.S. 833; *Koolish* v. *United States*, 340 F.2d 513 (C.A. 8), certiorari denied, 381 U.S. 951; *Green* v. *United States*, 332 F.2d 788 (C.A. 5), certiorari denied, 379 U.S. 949. Petitioner's argument that the issue is too complex to be entrusted to the jury is inconsistent with the jury's historic function, under the Sixth Amendment, to resolve even the most complex questions of fact (and mixtures of fact and law) that go to the general issue of guilt. Indeed, we think that defendants might have good constitutional ground to complain if an issue of this nature were removed from the jury's purview. Cf. *Jackson* v. *Denno*, 378 U.S. 368; *United States* v. *Barry*, 518 F.2d 342 (C.A. 2) (jury must pass upon voluntariness of confession).

3. Petitioner contends (Pet. 28-34) that the trial was infected "with repeated instances of prosecutorial misconduct" (Pet. 30) so serious that the misconduct cannot have been harmless error. However, the prosecution did not engage in a pattern of inten-

tional misconduct. At the sentencing of co-defendant Jenkins the district court characterized this trial as "a very fair trial" (Tr. 3056). The instances of "misconduct" cited by petitioner (Pet. 8-11, 30-31) lend no support to his contention, nor do they reflect an "overriding ambition" to secure a conviction by any means necessary (Pet. 31).

For example, while petitioner claims that the prosecution neglected the Jencks Act, he overlooks the fact that defense counsel received voluminous Jencks Act material prior to and during the trial. Petitioner discusses a minor instance of nonproduction (Pet. 8) involving government witness Masterson.[3] After Masterson had testified and had left the courthouse,[4] defense counsel discovered a set of notes written by Detective Robert Kanjian during an interview with Masterson the day before her testimony. Government counsel agreed to stipulate that the notes should have been produced and that Masterson, if recalled, would testify that she had never seen Cameron in a particular apartment (Tr. 1822-1823). This information,

[3] Since Masterson's testimony related exclusively to Cameron (except for her identification of the picture of co-conspirator), petitioner's trial counsel elected not to cross-examine her (Tr. 1572-1573). Indeed, the court considered her testimony to be "insignificant" (Tr. 1641) and wondered why the prosecution had called her as a witness (Tr. 1564-1565).

[4] The record does not support petitioner's contention that Masterson had left the jurisdiction (Pet. 8). The prosecutor offered to attempt to contact her (Tr. 1641), but was not given the opportunity.

from a minor witness, did not reflect on petitioner; the trial court correctly found that the notes had been unintentionally withheld and that their tardy production was harmless (Tr. 1703-1704, 1821).[5]

Petitioner also claims (Pet. 9) that exculpatory evidence relating to the pre-trial identification of Cameron by co-conspirator Lenwood Sharpe was withheld in violation of *Brady* v. *Maryland*, 373 U.S. 83. At the pre-trial hearing to determine the admissibility of Sharpe's identification testimony, the prosecutor disclosed portions of Sharpe's grand jury testimony pertinent to these identifications but neglected to disclose Detective Kanjian's grand jury testimony, which described Sharpe's photographic identification of Cameron as "tentative." However, Kanjian's statement was disclosed prior to Sharpe's testimony at trial, and defense counsel were able to question Sharpe about his photographic identification of Cameron (Tr. 1961-1963). Defense counsel also were able to bring out during cross-examination of Kanjian

[5] Another inadvertent omission involved a prior statement by Joann Enoch (one of the retailers) to Detective Kanjian; other Jencks Act material pertaining to Enoch had been given to defense counsel prior to trial (Tr. 9). After Enoch's testimony and the discovery of this statement, the prosecutor informed the court that the statement had been overlooked (Tr. 1167-1168). He suggested that defense counsel be permitted to re-open their cross-examination of Enoch (Tr. 1168-1169); the court agreed to permit further cross-examination of Enoch, but defense counsel declined (Tr. 2131). The court found that the delayed disclosure of this material had not prejudiced petitioner (Tr. 1188-1189, 1192). All defense counsel, in fact, agreed that the prosecutor had not deliberately withheld the material (Tr. 1170-1171, 1173, 1180).

the "tentative" nature of this identification (Tr. 2630-2632). No exculpatory material has been withheld either from petitioner or from the jury.

Petitioner's other claims of intentional misconduct are not well taken. Petitioner's assertion that the prosecutor's reference to heroin as the nation's number one enemy, and to the defendants as the "New York gang" represented by "New York lawyers", intimidated the jury (Pet. 11), is unsupported speculation. Moreover, the presence of various members of the United States Attorney's Office in the courtroom during various segments of a fourteen day trial, and even the "threatened" prospect of interlocutory appeals (Pet. 9),[6] did not intimidate the trial court. The court of appeals correctly found (Pet. App. 49):

> We are unable to see any impropriety in the United States Attorney or other principal prosecutors attending a trial of such importance particularly at crucial moments which may have required them to make a judgment whether an interlocutory appeal should be taken. There is nothing in the record before us to show that any actions of the United States Attorney were impermissible or undercut the fairness of the trial.

[6] One instance of a "threatened" interlocutory appeal occurred when the trial court ruled that *United States* v. *Ash*, 413 U.S. 300, required the presence of counsel at a post-indictment photographic identification. Because of this ruling the prosecutor, outside the presence of the jury, asked leave of the court to consult with his supervisory personnel concerning an interlocutory appeal (Tr. 821-858). This action was both necessary and proper.

Nor was the harmless error rule erroneously invoked with respect to the prosecution's reference in summation to his ability to call several hundred additional witnesses. Petitioner concedes that the record contains substantial evidence of his guilt (Pet. 31). The prosecutor's overstatement was met with a prompt cautionary instruction, and it is extraordinarily unlikely that the jury's verdicts could have been affected. Cf. *Donnelly* v. *DeChristoforo*, 416 U.S. 637.

4. Petitioner's challenge (Pet. 34-42) to the constitutionality (either facial or as applied) of the dangerous special drug offender sentencing statute (21 U.S.C. 849) was not raised in either the district court or the court of appeals and, accordingly, should not be considered here. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. Even if the claim were properly presented, we submit that it would be unnecessary for the Court to consider the questions. The lower federal courts are just beginning their consideration of Section 849 and its progenitor, 18 U.S.C. 3575. There is no conflict among the circuits, and several of the district court decisions considering Section 3575 are now on appeal. The Court should await developments in the courts of appeals before deciding whether it is necessary to consider these questions.[7]

[7] Several district courts have considered the meaning and constitutionality of Section 3575. See *United States* v. *Duardi*, 384 F. Supp. 874 (W.D. Mo.), appeal pending, C.A. 8, No.

In any event, petitioner's claims are insubstantial. Petitioner contends that Section 849(e)(2) and (e)(3) (defining a "special drug offender") are impermissibly vague and subject him to trial without jury and to double jeopardy. But "statutes are not automatically invalidated as vague simply because difficulty is found in defining whether certain marginal offenses fall within their language." *United States* v. *National Dairy Corp.*, 372 U.S. 29, 32. Moreover, the standard for determining the vagueness of a sentencing statute should be more relaxed than the test for determining the vagueness of a statute defining a substantive offense; a statute such as Section 849 deals with an area in which the sentencing judge has traditionally possessed discretion without regard to *any* standards. *Williams* v. *New York*, 337 U.S. 241; *Dorszynski* v. *United States*, 418 U.S. 424. Petitioner hardly can complain that Section 849 is vague as compared with this historical practice. Most of petitioner's complaints depend upon the notion that Section 849, in some manner, creates or defines a "crime." It does not. It simply structures the dis-

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75-1354; *United States* v. *Tramunti*, 377 F. Supp. 6 (S.D. N.Y.); *United States* v. *Holt*, No. 3-75-224, S.D. Tex., decided August 18, 1975. The Eighth Circuit recently has addressed the requirement of Section 849(a) that the notice set out "with particularity" the prosecution's reasons for invoking the statute. See *United States* v. *Kelly*, No. 74-1962, decided July 14, 1975. Two cases have dealt with the problem whether notice has been timely filed. *United States* v. *Noland*, 495 F.2d 529 (C.A. 5); *United States* v. *Edwards*, 379 F. Supp. 617 (M.D. Fla.), appeal pending, C.A. 5, No. 74-3248.

cretionary process by which those guilty of some specific crime will be punished. Indeed, Section 849 offers petitioner a full adversarial hearing and disclosure of all evidence and considerations upon which the sentence is based—advantages he would not receive in any alternative sentencing procedure.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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